2008

Flora Sue Macintosh v. Staker Paving and Construction Company : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS
STATE OF UTAH

FLORA SUE MACINTOSH, Plaintiff/Appellant, v. STAKER PAVING AND CONSTRUCTION COMPANY, Defendant/Appellee.	Case No. 20080549 CA

APPELLEE'S BRIEF

Appeal From a Final Judgment
of the Third District Court
for Tooele County, Honorable Mark S. Kouris

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LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings are identified in the caption on appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes:

Regulations:

JURISDICTION

Appellee, Staker Paving and Construction Company (hereinafter "Staker"), agrees with the jurisdictional statement of Appellant, Flora Sue Macintosh (hereinafter "Macintosh").

ISSUE PRESENTED FOR REVIEW

Did the trial court correctly grant Staker's Motion for Summary Judgment where Macintosh offered no evidence regarding the standard of care Staker was held to as a highway contractor regarding notifying motorists that a section of a road was closed to traffic and where Macintosh failed to dispute Staker's facts which established that it complied with standards established by state regulations? "A district court's decision to grant summary judgment is reviewed for correctness with no deference afforded to the district court. *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 13, 179 P.3d 760. The issue was preserved below by Staker's Motion for Summary Judgment. (R. 32.)

CONTROLLING AUTHORITIES

The following rule's interpretation is of importance to this appeal:

UT Admin. Code R920-3-1 (through 8/10/2007).

> Manual of Uniform Traffic Control Devices, Part VI, Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations, 1988 Edition, Revision 3, September 3, 1993 of the Federal Highway Administration is adopted by reference.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

This is an action for personal injuries sustained by Macintosh when she drove into a mound of dirt that had been placed on a closed section of SR-36 while it was under construction. Macintosh brought suit against Staker for negligence alleging that it failed to adequately warn motorists that this section of road was closed to traffic. (R. 3.) Macintosh served no written discovery requests, took no depositions and designated no expert witnesses. Staker moved for summary judgment after the conclusion of discovery on the grounds that Macintosh had no evidence to establish the standard of care Staker owed to motorists or that Staker had breached the standard of care. (R. 31-32.) Staker pointed out that it was required by state regulation to comply with the Manual of Uniform Traffic Control Devices, Part VI, Standards and Guides for Traffic Controls for Street and Highway Construction Maintenance, Utility, and Incident Management Operations, 1988 Edition, Revision 3, September 3, 1993 (the "Manual"). UTAH CODE ANN. §72-6-115; UT Admin. Code R920-3 (through 8/10/2007). (R. 53-54.) Staker argued that appropriate traffic control for a major road improvement project where some lanes are closed while others are re-channeled and diverted is not a topic that falls within the knowledge of the typical juror. (R. 54.) In order to establish a *prima facie* case Macintosh needed to offer expert testimony to determine the standard of care and whether Staker met the standard of care. (R. 54.)

Macintosh did not dispute Staker's statement of facts. Instead she responded by citing portions of her own deposition asserting that she did not see a sign indicating that the lane of traffic that she was driving on at the time of her accident was closed. (R. 62-63.) She argued that expert testimony was unnecessary because it is within the common understanding of lay jurors that a total failure to warn the public against entering a closed portion of the road is a breach of the standard of care Staker owed to the motoring public. (R. 61-62.)

In its reply Staker pointed out that Macintosh's assertion that there was a total failure to warn the public that a portion of the road was closed is contrary to the evidence in this case, including Macintosh's own testimony. Staker cited portions of Macintosh's deposition transcript where she testified that she did in fact see traffic control barrels and other traffic control devices. (R. 74-75.) The accident report prepared by the highway patrol also verified that there were traffic control devices blocking the closed portion of the road. (R. 74.) This case does not involve Staker completely failing to warn motorists that a portion of the road was closed; rather the issue is whether the traffic control that Staker implemented during construction to temporarily close certain lanes of travel and divert motorists into other lanes met the standard of care that Staker was held to as a highway contractor. Staker argued that Macintosh was required to offer expert testimony to establish the standard of care and whether the traffic control, which she admitted was in place, breached the standard of care. (R. 78.)

The trial court granted summary judgment to Staker without a hearing. (R. 88.)

STATEMENT OF FACTS

The following facts were either assumed to be true in the court below or were uncontroverted in the record:

In the summer and fall of 2005, the Utah Department of Transportation contracted with Staker to expand and improve State Road 36 in Tooele County. This is the main road connecting Tooele to I-80. Prior to this improvement project most of SR-36 was an undivided, two lane road running north and south. Staker improved this road to make it a four lane highway with two lanes running each way. (R. 59-60.)

During construction traffic lanes were shifted so that one side of the road was used for traffic with one lane open in each direction while the other side was under construction. At 6:00 p.m. on September 9, 2005, Macintosh drove south through the construction zone in broad daylight. She observed the shifted lanes of traffic, including the lane that she drove through. Macintosh turned west from SR-36 onto Village Boulevard. (R. 59.)

Three hours later Macintosh reversed her course to drive home. She drove east on Village Boulevard to its intersection with SR-36. At this time it was dark and there was little traffic. After waiting at the intersection for several minutes for the traffic light to change, Macintosh pulled into the intersection and attempted to make a left turn onto northbound SR-36 Somehow she became confused. Rather than turning into the lane for northbound traffic, Macintosh somehow drove between the traffic control barrels which closed off the east side of SR-36 to traffic. She proceeded on the closed section of

SR-36 until she drove into a mound of dirt that had been placed in the closed section of road. (R. 59.)

Fred Lupo was responsible for traffic control for Staker for the SR-36 highway project. (R. 58.) Mr. Lupo received training in traffic control through the Associated General Contractors and Utah Department of Transportation and has been certified in traffic control since 2000 with recertification every 2-3 years thereafter. (R. 58.) At the end of the work day on September 9, 2005 (a short time before the accident), Mr. Lupo inspected the traffic control for the SR-36 highway project and confirmed that it complied with the requirements set out in the Manual. (R. 57-58.) Following the accident, on the morning of September 10, 2005, Mr. Lupo again inspected the traffic control for the SR-36 highway project with representatives from the Utah Department of Transportation and again confirmed that it complied with the requirements set out in the Manual. (R. 57.)

The only witnesses identified in Macintosh's Initial disclosures are Macintosh herself, Dr. Meic Schmidt (Macintosh's treating physician), and "the individuals identified in the Defendants' Initial Disclosures." (R. 57, 77-78, 86.) None of the individuals identified in Staker's Initial Disclosures were deposed. (*Id.*) Macintosh did not supplement her initial disclosures. (*Id.*) Macintosh did not designate expert witnesses or provided expert reports. (*Id.*)

SUMMARY OF ARGUMENTS

Summary judgment was appropriate because Macintosh failed to offer evidence to establish the standard of care a highway construction company has to notify motorists of lane closures. Staker offered unrefuted evidence that it inspected the traffic control on the project shortly before and after the accident and confirmed that its traffic control complied with the standards established in the Manual. Macintosh was required to offer expert testimony to describe the standard of care that Staker was required to comply with when it closed a portion of the road and she failed to do so. Finally, undisputed evidence, including Macintosh's own testimony, establish that traffic control devices were present where she entered the closed section of road so Macintosh has the burden of proving that these devices did not meet the standard of care.

ARGUMENT

I. MACINTOSH FAILED TO CARRY HER BURDEN OF PROVING A *PRIMA FACIE* NEGLIGENCE CASE BECAUSE SHE DID NOT OFFER EVIDENCE REGARDING THE STANDARD OF CARE OWED BY STAKER TO WARN MOTORISTS OF CLOSED SECTIONS OF THE ROAD.

Macintosh brought this case claiming that Staker was negligent in the way that it warned motorists that a portion of road was closed. "To prevail on a negligence claim, a plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." *Thurston v. Workers Compensation Fund of Utah*, 2003 UT App. 438, ¶12. Macintosh was required to present evidence of every one of these elements to avoid

summary judgment. Kitchen v. Cal Gas Co., Inc., 812 P.2d 458, 462 (Utah App.1991) (citations omitted) ("The plaintiff bears the burden of proof and must establish a prima facie case to survive summary disposal of the case.").

Macintosh had the burden of proving that Staker owed her a duty and the scope of that duty. Joseph v. McCann, 2006 UT App 459 ¶ 4, 147 P.3d 547 ("Under Utah law, to maintain a claim for negligence, a plaintiff is required to establish that a defendant owes a duty of care to the plaintiff."). In this case Staker had a duty to meet the standard of care for highway construction contractor implementing traffic control on a construction project, including warning motorists when a section of road is closed to traffic. Summerill v. Shipley, 890 P.2d 1042, 1045 (Utah App. 1995) ("In a negligence case, such as the one before us, ***the standard of care defines the scope of the duty owed by the defendant to the plaintiff***.") (emphasis added). Macintosh failed to offer evidence of the standard of care that Staker had a duty to meet or the scope of that duty. Without establishing the scope of the duty Staker owed her, Macintosh was unable to prove that Staker breached the duty it owed her or make a *prima facie* case that Staker was negligent. Summary judgment should be upheld on that basis alone.

II. MACINTOSH FAILED TO REFUTE EVIDENCE THAT STAKER COMPLIED WITH REGULATIONS WHICH SET TRAFFIC CONTROL STANDARDS.

Staker was required by regulation to establish and maintain traffic control for the construction project in compliance with the Manual. UTAH CODE ANN. §72-6-115; UT Admin. Code R920-3-1 (through 8/10/2007). No other evidence of the standard of care

was presented to the trial court. The trial court was charged with responsibility for determining the duty which Staker owed to Macintosh. Duty was a question of law, not a question of fact. *C.T. v. Martinez*, 845 P.2d 246, 247 (Utah 1992) ("Whether a duty exists is a question of law to be determined by the court."). While the trial court's ruling does not explicitly say so, it appears that the trial court found that the Manual described the duty Staker owed to motorists to control traffic and warn of lane closures on road construction projects. (R. 85-86.)

In Staker's Memorandum in Support of its Motion for Summary Judgment it offered a statement of undisputed material facts that were supported by evidence as required by Rule 7(c)(3)(A). (R. 57-58.) These facts established that Staker had an employee on the construction project at issue, Mr. Lupo, who was responsible for traffic control. Traffic control included notifying motorists of construction, that traffic lanes were diverted, and lanes or portions of the road were closed. Staker's statement of undisputed material facts established that Mr. Lupo was trained and certified in traffic control and was knowledgeable about the standards included in the Manual. At the end of the work day on September 9, 2005, Mr. Lupo inspected the traffic control for the project and verified that it complied with the standards set out in the Manual. The following morning Mr. Lupo inspected the traffic control for the project again, this time with representatives of the Utah Department of Transportation. This second inspection confirmed that Staker's traffic control complied with standards in the Manual. (R. 57-58.) This evidence established that Staker's traffic control for this construction project

met the standards in the Manual. The Manual was the only evidence of the standard of care that was presented to the Court.

Macintosh erroneously argues that there is a factual dispute that precludes summary judgment. She cites a portion of her deposition where she testified that when she pulled into the intersection before turning onto the closed section of road she recalled seeing some traffic barrels but did not see any signs, and after she drove past the barrels she did not see any markers blocking the road. (Appellant's Brief, 3.) This does not create a dispute of fact that must be submitted to the jury. Macintosh's testimony does not refute the facts offered by Staker establishing that its employee who was trained and certified in traffic control inspected the traffic control for the project before and after the accident and confirmed it complied with the standards in the Manual. Macintosh's testimony is insufficient to establish the standard of care or a breach of the standard of care by Staker. Macintosh's testimony does not create an issue of fact that precludes summary judgment.

Macintosh did not controvert any fact offered by Staker as required by Utah Rule of Civil Procedure 7(c)(3)(A) & (B). (R. 60-63.) The trial court found that Macintosh presented no evidence setting forth specific facts to refute the facts asserted by Staker which would create a genuine issue for trial. (R. 85-86.)

Macintosh failed to present evidence that the standard of care owed by Staker was different from the standards included in the Manual. Macintosh failed to present evidence to dispute the evidence offered by Staker that proved it complied with the

standards found in the Manual. The trial court was correct to grant summary judgment in favor of Staker and this ruling should be upheld on appeal.

III. MACINTOSH FAILED TO OFFER EXPERT EVIDENCE TO DETERMINE THE STANDARD OF CARE FOR TRAFFIC CONTROL ON HIGHWAY CONSTRUCTION PROJECTS.

Expert testimony is not required in every negligence case. However, it is necessary to determine the applicable standard of care in a particular trade or profession and whether the defendant met that standard. *See, e.g.*, *Ortiz v. Geneva Rock Products, Inc.*, 939 P.2d 1213, 1217 (Utah App. 1997), citing *Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253 (Utah 1985).

Macintosh was required to submit expert testimony to establish the standard of care for highway construction contractors, particularly if she claimed the standard of care was different than the standards described in the Manual. The standard of care for highway construction contractors performing temporary traffic control for a major road improvement project where lanes were closed and traffic was diverted is not a topic that falls within the knowledge of the typical juror. The Manual containing the standards adopted by the state of Utah for traffic control devices is several hundred pages long. Contrary to what many jurors might think, traffic control is far more technical than placing a few cones or setting up a few signs. This is particularly true under the circumstances which existed on the project where Macintosh had her accident. Traffic control did not simply involve blocking off an entire road. On the relevant construction project one side of the road was left open. Traffic traveling in both directions was

diverted and channeled into narrowed lanes on that side of the road while the other side of the road was closed for construction. Expert testimony is required because the ordinary lay juror does not have knowledge of the standard of care for highway contractors implementing traffic control under these circumstances. A jury should not be left to its own devices to guess the standard of care that Staker should be held to and decide whether Staker breached that standard or not. Macintosh was required to offer expert opinion testimony to establish the standard of care and describe if and how Staker allegedly breached the standard. Macintosh failed to do so. Summary judgment in favor of Staker was warranted and should be upheld.

IV. MACINTOSH'S DEPOSITION ESTABLISHES THAT SHE WAS AWARE OF LANE CHANGES AND SHE SAW BARRICADES BLOCKING THE CLOSED LANE PRIOR TO THE ACCIDENT.

Macintosh claims that she did not need expert witness testimony, alleging: "A jury is fully capable of determining if the complete failure to mark a road as closed is negligent conduct." (Appellant's Brief, 4.) However, Macintosh's own testimony contradicts her allegation that there was a complete failure by Staker to mark a portion of the road closed and proves that even she observed barricades blocking and marking the closed off portion of the road.

Macintosh testified that when she turned from Village Boulevard onto SR-6 she did not see any sign saying "keep right" (traffic in that direction was actually being diverted to the left). (R. 74-75.) However, in her Memorandum Macintosh conceded that when she turned onto SR-36 "she saw barrels on the road." (R. 62.) She testified that the

traffic control barrels in the road which spaced about three or three and a half feet apart. (R. 69, 74.) Significantly, Macintosh also testified that several hours before the accident she drove through the same section of SR-36 and noticed the traffic barrels in the road that separated the closed off lanes of traffic. (R. 65-68, 74.)

In addition to Macintosh's testimony, the highway patrol officer who investigated the accident reported that it occurred in a closed portion of the road. His report notes the traffic control barrels between the open and closed portions of the road. (R. 48, 74.)

Macintosh's testimony confirmed that there were traffic control devices in the road. These devices were markers used to close portions of the road and alert motorists that portions of the road were closed. Macintosh's claim that there was a "complete failure to mark the road as closed" is unsupported and contrary to the evidence. (Appellant's Brief, 4.) Therefore the issue is not, as Macintosh argues, whether a complete lack of traffic control devices closing a portion of the road fell below the standard of care. Rather, the issue is whether Staker's traffic control that was present at the time of Mackintosh's accident closing off a portion of the road met the standard of care that Staker owed to motorists. Macintosh failed to offer evidence that it did not.

Macintosh testified that she was confused by the traffic control barrels and other devices marking the lane diversions and closing lanes to traffic but she did see them and confirmed that markers were present. Macintosh's testimony that she was confused by the traffic control markers closing the road and was somehow able to get past them and on to the closed section of road is not evidence that Staker was negligent. "[T]he mere happening of the accident to plaintiff is no proof of negligence on the part of either

plaintiff or defendant or evidence of the same." *Vitale v. Belmont Springs*, 916 P.2d 359, 365 (Utah App. 1996) quoting *Williams v. Ogden Union Ry. & Depot*, 119 Utah 529, 545, 230 P.2d 315, 323 (1951).

Staker's statement of undisputed material facts, which Macintosh did not dispute, established that the traffic control that was in place at the time of the accident complied with the standards in the Manual. Macintosh failed to offer expert testimony establishing that the standard of care was different from the standards in the Manual or evidence that the traffic control that was in place which she observed fell below the standard of care. The trial court's ruling granting Staker's Motion for Summary Judgment was therefore correct and should be upheld.

CONCLUSION

For the reasons set forth above, Appellee respectfully requests that the court affirm the district court's order granting summary judgment.

DATED this 24th day of December, 2008.

CHRISTENSEN & JENSEN, P.C.

George W. Burbidge II
Attorneys for Defendant/Appellee

ADDENDUM

1. Minute Entry

IN THE THIRD JUDICIAL DISTRICT, TOOELE COUNTY

STATE OF UTAH

FLORA SUE MACINTOSH, Plaintiff, vs. STAKER PAVING AND CONSTRUCTION COMPANY, Defendant.	**MINUTE ENTRY** Case No.: 060300169 Judge: MARK S. KOURIS

The above matter is before the Court on Defendant's Notice to Submit its Motion for

Material Facts, rather Plaintiff writes, "She [Plaintiff] indicated that she saw barrels on the road

which were not blocking the lane of traffic into which she turned, and there was no sign indicating that the road was closed." (Pl.'s Opp., 2) (citation omitted).

Utah Rules of Civil Procedure 56(e) provides in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of the pleadings*, but the response, by affidavits or as otherwise provided in this rule, *must set forth specific facts* showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(2008) (emphasis added).

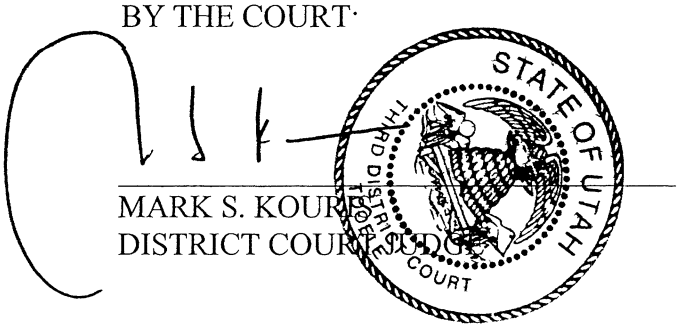
Furthermore, the Utah Court of Appeals explained, "Although it is true that summary judgment is reserved for only the most clear-cut negligence cases, bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude entry of summary judgment." Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445, 446 (Utah Ct. App. 1989) (quotation omitted); see also FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1335 (Utah 1979) ("Issues of negligence ordinarily present questions of fact to be resolved by the fact-finder. It is only when the facts are undisputed and where but one reasonable conclusion can be drawn therefrom that such issues become questions of law").

Based on the foregoing, Defendant's Motion for Summary Judgment is GRANTED.

Defendant is to prepare an Order for the Court's signature.

Dated this 23 day of APRIL 2008.

BY THE COURT:



MARK S. KOURIS
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Minute Entry dated this 28 day of April 2008, postage prepaid, to the following

George W Burbidge, II
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Valerie Bassett

STATE OF UTAH
THIRD DISTRICT COURT
TOOELE

CERTIFICATE OF MAILING

On this 24th day of December, 2008, I caused a true and correct copy of the foregoing **APPELLEE'S BRIEF** to be mailed via first class mail, postage prepaid, to Plaintiff/Appellant's counsel of record to the following address:

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